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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RACHAN SOMWANGTAWIL, Defendant and Appellant.	B171631 (Los Angeles County Super. Ct. No. GA053011)

APPEAL from a judgment of the Superior Court of Los Angeles County, Teri Schwartz, Judge. Affirmed.

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jaime L. Fuster, Lawrence M. Daniels, and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

Rachan Somwangtawil appeals from the judgment entered following a jury trial that resulted in his conviction of attempted voluntary manslaughter (Pen. Code, § 664/192, subd. (a); count 1)[1]; aggravated mayhem (§ 205; count 2); assault with a deadly weapon and by means of force likely to inflict great bodily injury (§ 245, subd. (a)(1); count 3); and findings that appellant personally used a deadly and dangerous weapon (§ 12022, subd. (b)(1)); counts 1 & 2); and that appellant inflicted great bodily injury (§ 12022.7, subd. (a)); count 1). He was sentenced to prison on count 2 to the eight-year upper term, plus one year for the deadly weapon use enhancement, and ordered to pay a $1,000 restitution fine. The court imposed and stayed sentences on the other counts pursuant to section 654.

Appellant contends the trial court committed prejudicial error by failing to modify CALJIC No. 5.56 ("Self-Defense -- Participants in Mutual Combat") to instruct the jury that during a sudden and deadly counterattack, a defendant did not have to comply with the enumerated prerequisites before engaging in self-defense. He contends his count 3 conviction must be reversed, because a violation of section 245, subdivision (a)(1), as pleaded (count 3), is a lesser included offense of mayhem (count 2). He also contends the abstract of judgment must be corrected to reflect no parole revocation fine was imposed.

In a supplemental brief, he contends the trial court imposed an upper term on count 2 (mayhem) in violation of *Blakely v. Washington* (2004) __ U.S. __ [124 S.Ct. 2531] (*Blakely*), and thus, "[a] remand to the trial court [is warranted] for a jury trial on the aggravating factors; or, alternatively, for imposition of a midterm sentence on the base term."

Based on our review of the record and applicable law, we affirm the judgment. We shall direct the superior court to prepare an amended abstract of judgment to reflect no parole revocation fine was imposed.

FACTUAL SUMMARY

We review the evidence in the light most favorable to the People and presume the

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

existence of every fact the trier could reasonably deduce from the evidence that supports the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The following summary is based on this appellate standard of review.

On May 6, 1995, at about 3:00 p.m., George Tomich approached and spoke a few minutes with appellant, who was standing with "Jessie," and "Neil" in the driveway of his house on Hill Street in Pasadena. Appellant then asked Louis Brock, who was with Tomich, "What's up, cuz'?" Brock replied, "I don't get down like that. I don't bang." Tomich told appellant, whom he had known for about a year, "He's cool. He's with me." When appellant and Jessie yelled at Brock, "We're going to get you, nigger," Tomich told the three, "Just cool out." Tomich and Brock continued walking to Tomich's house, which was about three houses away. Tomich went inside, and Brock went over and sat on a nearby bus bench to catch a bus to go home.

A few minutes later, Neil drove slowly past. After appellant and Jessie, the passengers, pointed at Brock, the car stopped. Brock rose and headed towards Tomich's house to call for a ride.

According to Brock, Tomich opened the front door when he knocked and gave Brock permission to use the phone. Appellant and Jessie then approached and stood within five feet of Brock. As Brock turned around and stepped off the porch, Jessie charged, and the two fought with their fists for about three minutes.

Tomich denied Brock knocked on his front door and did not recall Brock asking to use his phone. While in his backyard, Tomich heard yelling, "We're going to get you, nigger. We're going to kill you." When he went to his driveway, he saw Jessie and appellant, who was holding an 8- to 10-inch knife, "screaming racial stuff" at Brock. As they approached, Brock backed away.

Appellant grabbed Tomich by the throat and placed the knife to his neck. Tomich slapped away the knife and pushed him away. He told appellant to drop the knife and fight with fists. Appellant responded, "Keep your mouth shut."

After asking, "What's up now?" Jessie attacked Brock, and the two fought with their fists for about three minutes. Tomich and appellant watched the fight.

After Brock shouted "[h]e's got a weapon," Fred Pino, Tomich's stepfather, exited the house and held Jessie on the ground. He warned Jessie not even to "think about pulling a knife out; I'll break your neck." When appellant with his knife raised began to approach Pino, Tomich grabbed appellant's ankles and pulled him to the ground to restrain him.

Appellant began swinging his knife at Tomich, who was on top of him. Tomich, who simply wanted to restrain appellant, struck him with one hand while holding him by the shirt collar with the other. Appellant placed Tomich in a bear hug and stabbed him in the back five times. Appellant then stood over Tomich, who had collapsed, threatened to kill him and his family, and fled. Two of the stab wounds punctured Tomich's lungs and one penetrated his spinal cord, leaving him a paraplegic.

Appellant did not present any evidence.

DISCUSSION

1. Further Self-Defense Instruction Modification Unwarranted

Appellant contends the trial court committed prejudicial error by failing, sua sponte, to modify CALJIC No. 5.56 to instruct the jury essentially that he would be justified in employing deadly force if the jury found Tomich's sudden and perilous counterattack precluded appellant from declining to fight further and safely retreating. There was no error.

CALJIC No. 5.56, as modified at appellant's request to add the phrase "by words or conduct," instructed the jury: "The right of self-defense is only available to a person who engages in mutual combat if [he] has done all of the following by words or conduct: [¶] 1. [He] has actually tried, in good faith, to refuse to continue fighting; [¶] 2. [He] has clearly informed [his] opponent that [he] wants to stop fighting; [¶] 3. [He] has clearly informed [his] opponent that [he] has stopped fighting; and [¶] 4. [He] has given [his] opponent the opportunity to stop fighting. [¶] After he has done these four things, [he] has the right to self-defense if [his] opponent continues to fight."

In *People v. Quach* (2004) 116 Cal.App.4th 294, the court concluded CALJIC No. 5.56 improperly implied that self-defense during mutual combat was available only if the

defendant were successful in trying to inform his opponent that he wanted to stop and had stopped fighting. (*Id.* at pp. 300-301.) The court further concluded that the jury should have been given "an instruction such as the one approved in *People v. Gleghorn* (1987) 193 Cal.App.3d 196, 201, which told the jury, '[W]here the counter assault is so sudden and perilous that no opportunity be given to decline further to fight and he cannot retreat with safety he is justified in slaying in self-defense.'"[2] (*Id.* at pp. 302-303.)

Contrary to appellant's claim, the trial court was not required to give a version of CALJIC No. 5.56 modified to correspond essentially to the above language quoted from *Gleghorn*.

"Although a trial court must instruct on every issue supported by substantial evidence, the court need not instruct on a theory which is not supported by the evidence. [Citations.]" (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1523.) Moreover, "[i]t is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case. [Citation.]" (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.)

In *Quach*, the court found the absence of a *Gleghorn*-type instruction was reversible error in light of Quach's version of the facts, which indicated that "the initial confrontation was escalated when a TRG member pulled or fired a gun and that Quach may have responded to that provocation" and that "the gun [was] fired *at Quach* before he took out his own pistol." (*People v. Quach, supra*, 116 Cal.App.4th at pp. 297-298, 303, original italics.)

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[2] In 2004, based on *Quach*, *Gleghorn*, and "cases cited therein," CALJIC No. 5.56 was revised by adding an "alternative paragraph number 2," which reads: " . . . If the other party to the mutual combat responds in a sudden and deadly counterassault, that is, force that is excessive under the circumstance, the party victimized by the sudden excessive force need not attempt to withdraw and may use reasonably necessary force in self-defense." (CALJIC No. 5.56 (2004 Re-Rev.); Use Note.)

These are not our facts. The uncontroverted evidence is that Tomich's attack on appellant was in defense of Pino, whom appellant had been approaching with his knife raised. After toppling appellant, Tomich held him to the ground and swung at him whenever he tried to move. It is undisputed that Tomich was unarmed. The fact that Tomich, a member of his high school wrestling team, used tactics learned as a team member to subdue and restrain appellant does not compel an inference that his attack was "perilous." Also, although appellant may have been unable to retreat because of Tomich's restraint, nothing Tomich did or said precluded appellant from declining to fight further and inform Tomich of his intent to do so. Accordingly, instruction based on *Gleghorn* and *Quach* was unwarranted.

2. Assault With Deadly Weapon Not Lesser Included Offense of Mayhem

Appellant contends his count 3 conviction for violating section 245, subdivision (a)(1), must be reversed, because, as pleaded, the underlying offense of assault by means of force likely to produce great bodily injury[3] is a lesser included offense of mayhem (count 2). We disagree.

"In California, a single act or course of conduct by a defendant can lead to convictions 'of *any number* of the offenses charged.' (§ 954, italics added; *People v. Ortega* (1998) 19 Cal.4th 686, 692 . . . .) But a judicially created exception to this rule prohibits multiple convictions based on necessarily included offenses. (*People Ortega, supra,* at p. 692 . . . ; *People v. Pearson* (1986) 42 Cal.3d 351, 355 . . . .)

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[3] Count 3 alleged appellant violated section 245, subdivision (a)(1) by committing assault with a deadly weapon *and* assault by means of force likely to produce great bodily injury. He was convicted as charged. Appellant's position is that "[s]ince the assault was committed by means likely to produce great bodily injury, that fact was sufficient to convict him of section 245, subdivision (a)(1); and because that conduct was necessarily included in the mayhem offense, the assault was a necessarily-included offense of mayhem." He does not claim that assault with a deadly weapon is a necessarily included offense of mayhem.

"In deciding whether an offense is necessarily included in another, we apply the elements test, asking whether "'"'all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense."'"' (*People v. Lopez* (1998) 19 Cal.4th 282, 288 . . . .) In other words, 'if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.' (*Ibid.*)" (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034.)

In contrast, the "accusatory pleading" test "looks to whether 'the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified [some] lesser offense is necessarily committed.' (*People v. Lopez, supra*, 19 Cal.4th at pp. 288-289 . . . .) Generally, courts use that test to determine whether to instruct a jury on an uncharged lesser offense. [Citations.] Some Court of Appeal decisions have concluded that the accusatory pleading test, which 'protects the defendant's due process right to adequate notice before being convicted of a lesser offense *instead* of the charged offense [therefore] does not apply to considerations of whether multiple convictions are proper.' (*People v. Miranda* (1994) 21 Cal.App.4th 1464, 1467 . . . ; accord, *People v. Scheidt* (1991) 231 Cal.App.3d 162, 165-171 . . . ; *People v. Watterson* (1991) 234 Cal.App.3d 942, 947, fn. 15 . . . .)" (*People v. Montoya, supra*, 33 Cal.4th at p. 1035.)

In *Montoya*, *supra*, our Supreme Court concluded "[w]e need not decide here whether these decisions are correct because applying the accusatory pleading test in this case does not assist defendant." (33 Cal.4th at pp. 1035-1036.)

We also do not need to reach this issue for the same reason. We begin by examining the offense of mayhem as pleaded in count 2. (*People v. Montoya, supra*, 33 Cal.4th at p. 1035 [only the pleading for the greater offense considered, without consideration of the knife use allegation]; *People v. Wolcott* (1983) 34 Cal.3d 92, 100-101 [enhancement allegations not considered].)

In pertinent part, count 2 alleged: "On or about May 6, 1995, in the County of Los Angeles, the crime of AGGRAVATED MAYHEM, in violation of PENAL CODE SECTION 205, a Felony, was committed by [appellant], who did unlawfully and under

circumstances manifesting extreme indifference to the physical and psychological well being of another, intentionally cause permanent disability and disfigurement and deprivation of a limb, organ and body member of GEORGE TOMICH."

"There is no allegation that the disfiguring or disabling injury was accomplished by means of, or even that it was the result of, force likely to produce great bodily injury." (*People v. Ausbie* (2004) 123 Cal.App.4th 855, 863.) Accordingly, assault by means likely to produce great bodily injury (§ 245, subd. (a)(1)) is not a lesser included offense of mayhem. (*Ibid.*)

For a contrary conclusion, appellant relies on *People v. De Angelis* (1979) 97 Cal.App.3d 837. *De Angelis* is factually inapplicable. As the *Ausbie* court explained, "[I]ts holding is limited: 'An assault is necessarily included in mayhem where the assault is a continuing event and the mayhem results during the course thereof. The lesser merges into the major.' ([*De Angelis*], at p. 841.) Though the *De Angelis* defendant had been charged with mayhem and with assault on the same victim by means of force likely to produce great bodily injury, the jury convicted *De Angelis* only of mayhem and the lesser offense of simple assault. Thus, the court's holding that assault is a lesser offense subsumed in the offense of mayhem (see also *People v. McKelvy* (1987) 194 Cal.App.3d 694, 702 . . . ; *People v. Krupa* (1944) 64 Cal.App.2d 592, 597 . . .) does not also mean that assault by means of force likely to produce great bodily injury is so subsumed." (*People v. Ausbie, supra*, 123 Cal.App.4th at p. 860, fn omitted.)

3. Count 2 Upper Term not Violative of Blakely/Apprendi

Appellant contends that because the trial court imposed the upper term on count 2 (mayhem) in contravention of *Blakely v. Washington, supra*, 542 U.S. __ [124 S.Ct. 2531], "this matter requires a remand to the trial court for a jury trial on the aggravating factors; or, alternatively, for imposition of a midterm sentence on the base term." We conclude that neither *Blakely,* nor *Apprendi v. New Jersey* (2000) 530 U.S. 466 was violated by the court's choice of the upper term.

The trial court selected the eight-year upper term on appellant's mayhem conviction (count 2) and added one year for the deadly weapon (knife) enhancement.

At sentencing, the court indicated it would be "giving [appellant] the maximum sentence I can legally give him." After acknowledging the jury "rendered a lesser included verdict on two counts," the court "attribute[d] [this] to the excellent lawyering that went on in this case by [appellant's attorney]" and stated its view that it was "unfortunate the case was presented as it was [because appellant was] entirely responsible for everything that took place."

The court particularly found compelling that "as a result we have an individual [Tomich] who is paralyzed, which is the greatest of great bodily injuries that one can imagine. There is just about nothing worse." The court added that "Mr. Tomich has to suffer the rest of his life the consequences of [appellant's] actions. Mr. Tomich acted appropriately [and] lawfully. Mr. Tomich had every right to do what he did [which] was defending himself against a possible stabbing by [appellant]."

Although noting "but for the lawyering here, I think we might have seen a different result," the court acknowledged, "I am bound by the findings of this jury. I respect the findings of this jury based on what they heard. Their findings were certainly appropriate."

The court then stated, "[N]onetheless, [appellant] is deserving of every day I can give him and no less. [Appellant], as the instigator; the person that provoked the incident; the person that sought out the fight; the person that brought the deadly weapon to the fight against unarmed individuals; and the instigator; the leader; the person that got himself into the situation that [he] found himself in; and the person that was lawfully being restrained by an individual who was attempting to protect himself against an attack with a knife, . . . those are all aggravating factors in my mind which outweigh whatever mitigating factors that might exist in this case."

In mitigation, the court described appellant as "a young man [who] had no prior history [and] found himself in a situation where he acted, according to the defense, to protect himself."

The court concluded that because appellant was the instigator, "the aggravating factors outweigh whatever mitigating factors are present in this case. And I believe that as such the high term is appropriate."

In *Apprendi v. New Jersey, supra*, 530 U.S. 466, the United States Supreme Court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt." (*Id*. at p. 490.) In *Blakely*, the court explained that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."[4] (*Blakely, supra*, 542 U.S. __ [124 S.Ct. 2531, 2537, original italics.) In other words, the "statutory maximum" does not refer to "the maximum sentence a judge may impose after finding additional facts, but [to] the maximum he may impose *without* any additional findings." (*Ibid.*, original italics.)

In this instance, the trial court relied upon a factor reflected in the jury verdict to justify imposition of the upper term on count 2. One aggravating factor suffices to sustain the imposition of an upper term. (See, e.g., *People v. Osband* (1996) 13 Cal.4th 622, 728; *People v. Castellano* (1983) 140 Cal.App.3d 608, 615.)

The alternative facts that "[t]he defendant was armed with *or* used a weapon at the time of the commission of the crime" are appropriate aggravating circumstances. (Cal. Rules of Court, rule 4.421(a)(2), italics added.)[5] The trial court expressly found appellant was "the person [who] brought the deadly weapon to the fight against unarmed

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[4] We note the issue of *Blakely's* application to California's determinate sentencing scheme, including the upper term, is currently before the Supreme Court. (See *People v. Towne* (July 14, 2004, S125677); *People v. Black* (July 28, 2004, S126182.) We further note that on January 12, 2005, the United States Supreme Court applied *Blakely* to the Federal Sentencing Guidelines in *United States v. Booker* (2005) __ U.S. __ [125 S.Ct. 738].

[5] All further rule references are to the California Rules of Court.

individuals." Appellant thus was armed during the commission of the mayhem, and this factor alone justifies imposition of the upper term.

Although the jury did not expressly find that appellant was armed with a deadly weapon, this finding was implicit in its special finding that appellant used a deadly weapon in committing the mayhem. (§ 12022, subd. (b)(1).)[6]

We therefore conclude the trial court did not violate *Apprendi/Blakely* by relying on this implied jury finding in imposing the upper term. In view of the court's unequivocal statement of intent to give appellant "the maximum sentence [it] can legally

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[6] We note imposition of the one-year deadly weapon use enhancement (§ 12022, subd. (b)(1)) does not preclude the court from relying on the armed with a (deadly) weapon factor (rule 4.421(a)(2)) to impose the upper term on the theory of impermissible dual use of the same facts.

"The statutes and rules impose few explicit bans on the dual use of sentencing factors." (*People v. Scott* (1994) 9 Cal.4th 331, 350, fn. 12.) Being armed with a deadly weapon is treated as a different aggravating fact than using a deadly weapon under rule 4.421(a)(2), which refers to these facts in the disjunctive: "armed with *or* used a [deadly] weapon." (Italics added.)

Moreover, although use of a deadly weapon is a fact which may trigger an impermissible dual use, the same cannot be said of being armed with a deadly weapon in this context. "[T]he court generally cannot use *a single fact* both to aggravate the base term and to impose an enhancement." (*People v. Scott, supra*, 9 Cal.4th at p. 350, italics added.) The trial court thus would be precluded from imposing the upper term based on appellant's use of a deadly weapon unless the court first struck the one-year enhancement for the deadly weapon use. (Rule 4.420(c) ["[A] fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so"].) In contrast, being armed with a deadly weapon in this instance is not a fact which gives rise to a possible enhancement. (Cf. § 12022, subd. (a)(1) [one-year armed with firearm enhancement].)

"[T]he aim of the determinate sentence law [is] to impose punishment commensurate with culpability." (*People v. Baries* (1989) 209 Cal.App.3d 313, 321.) The trial court carried out this directive by imposing the aggravated term based on appellant's being armed with a deadly weapon and, because he was not merely armed, by imposing the deadly weapon use enhancement based on the additional culpable fact that appellant used the deadly weapon.

In any event, appellant forfeited any dual use claim by failing to object specifically to the armed factor to support the upper term. (*People v. de Soto* (1997) 54 Cal.App.4th 1, 7.)

give him," a remand to afford the trial court an opportunity to decide whether it would impose the upper term based on this lone factor is not warranted. (See, e.g., *People v. Blessing* (1979) 94 Cal.App.3d 835, 839 [idle gestures not indulged].)

4. Correction of Abstract of Judgment Warranted

The reporter's transcript reflects the trial court imposed a $1,000 restitution fine (§ 1202.4) but declined to impose a parole revocation fine (§ 1202.45), because section 1202.45 was not enacted until after appellant's crimes were committed. (See Stats. 1995, ch. 313, § 6, p. 1758.) In contrast, both the November 21, 2003, minute order and the abstract of judgment recite a parole revocation fine of $1,000 was imposed under section 1202.45.

We deem the reporter's transcript to reflect the correct record. (See, e.g., *People v. Smith* (1983) 33 Cal.3d 596, 599; *People v. Ritchie* (1971) 17 Cal.App.3d 1098, 1103-1104; *In re Evans* (1945) 70 Cal.App.2d 213, 216.) Accordingly, an amended abstract of judgment must be prepared to reflect no parole revocation fine (§ 1202.45) was imposed.

DISPOSITION

The judgment is affirmed. The superior court is directed to prepare an amended abstract of judgment to reflect no parole revocation fine (§ 1202.45) was imposed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GRIMES, J.*

We concur:

HASTINGS, Acting P.J. CURRY, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.